***United States Court of Appeals***

***for the Second Circuit***

# PETITION FOR REHEARING EN BANC

74-1678

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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

PHILIP ZANE, JEROME E. SILVERMAN,
and ROBERT S. PERSKY,

Defendants-Appellants.

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ON APPEAL FROM A DENIAL OF A MOTION FOR A NEW TRIAL OF
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

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PETITION FOR REHEARING AND HEARING EN BANC
ON BEHALF OF APPELLANT ROBERT S. PERSKY

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Cases Cited

PETITION FOR REHEARING
AND HEARING EN BANC

Appellant Robert S. Persky respectfully petitions this Court for a rehearing on this appeal and for a hearing en banc pursuant to Rules 35(b) and (c) and 40 of the Federal Rules of Appellate Procedure. This appeal was argued on October 1, 1974 before a panel of this Court consisting of Circuit Judges Medina, Mansfield and Anderson. The denial of appellant's motion for a new trial was affirmed and an opinion written for the panel by Circuit Judge Medina on November 4, 1974.

The basis of the motion for a new trial after a conviction for filing a false Annual Report with the Securities and Exchange Commission was the series of events occurring shortly after appellant's conviction which in summary are as follows: Akiyoshi Yamada, a government witness, who gave extensive testimony against appellant, had pleaded guilty to a one-count indictment charging conspiracy to file the false report and had agreed to cooperate with the government. During the trial he testified as to past crimes and perjuries but claimed that he had reformed and was telling the truth at petitioner's trial. Less than two weeks after

appellant's conviction Yamada came before Judge Cooper for sentencing and, as alleged in a subsequent indictment of Yamada to which he pleaded guilty, Yamada instituted a conspiracy to defraud Judge Cooper in order to obtain a reduced sentence. To this end, Yamada submitted false, forged and fictitious letters to Judge Cooper, all testifying to his good character and public works. It is undisputed that Yamada's motive in cooperating with the government and in initiating the conspiracy to defraud Judge Cooper was the same -- i.e., to obtain a reduced sentence.

Judge Wyatt denied a motion for a new trial ruling that the new evidence was merely cumulative impeaching evidence. This Court affirmed holding that (1) United States v. Mesarosh, 352 U.S. 1 (1956) is inapplicable and (2) under traditional Rule 33 concepts, the motion for a new trial was properly denied.

## POINT I

### THE DECISION OF THE PANEL RESTS ON THE ERRONEOUS ASSUMPTION THAT THE CIRCUIT COURTS LACK SUPERVISORY JURISDICTION OVER THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE DISTRICT COURT

The panel attempts to distinguish Mesarosh v. United States, 352 U.S. 1 (1956), on the ground that it

represents a "sui generis exercise by the Supreme Court of its supervisory jurisdiction. . . " Thus, Judge Medina's opinion implies that the circuit courts lack supervisory powers over the district courts, and that the Supreme Court alone possesses the administrative capacity to overturn a district judge's order denying a defendant's motion for a new trial. Such a belief is wholly unfounded; nowhere in the Mesarosh holding does the Supreme Court suggest that it alone, and not a circuit court, is empowered to grant the such relief. Indeed, in United States v. Chisum, 436 F.2d 645 (9th Cir. 1971), the Ninth Circuit Court of Appeals exercised precisely the kind of supervisory jurisdiction which the panel would seemingly deny this Circuit.* See also Remmer v. United States, 350 U.S. 377 (1956); Imbler v. Craven, 298 F. Supp. 795 (C.D. Cal. 1969).

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* Authority for the exercise of this Court's discretion in criminal appeals has a statutory basis as well; 28 U.S.C. § 2106 provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

## POINT II

### IN VIEW OF MESAROSH V. UNITED STATES, THE DENIAL OF DEFENDANT-APPELLANT'S MOTION FOR A NEW TRIAL WAS AN ABUSE OF DISCRETION REMEDIABLE BY THIS COURT

Mesarosh v. United States, supra, requires that this court, acting within its supervisory authority, reverse the district court's denial of defendant-appellant's motion for a new trial. In that case, defendant had been convicted of conspiracy to violate the Smith Act. One government witness, Joseph D. Mazzei, testified at other subsequent proceedings for the government during which his testimony became increasingly bizarre and far-fetched. While Mesarosh's appeal was pending before the Supreme Court, the Solicitor General filed motion papers with the Court in which he stated that although he believed Mazzei was telling the truth at Mesarosh's trial, Mazzei's subsequent testimony was such as to warrant a hearing to establish his credibility in the Mesarosh proceeding. The Supreme Court held that a new trial was the only correct remedy stating,

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tained, and there can be no other just result than to accord petitioner a new trial.

> "The district judge is not the proper agency to determine that there was sufficient evidence at the trial, other than that given by Mazzei, to sustain a conviction of any of the petitioners. Only the jury can determine what it would do on a different body of evidence...." Supra at 9, 12.

Chief Justice Warren went on to conclude:

> "Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity....
>
> "The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial." Supra at 14.

The instant case is even more compelling than Mesarosh. Judge Medina's statement to the contrary is not supported by the following comparative analysis:

Comparative Analysis

| Element | Mesarosh | Instant Case |
|---|---|---|
| 1. How the subsequent perjury is brought to the attention of the judiciary. | 1. The Solicitor General informs the Court. | 1. The United States Attorney causes an indictment to be returned against Yamada and appellant moves for a new trial. |

| | | | | | |
|---|---|---|---|---|---|
| 2. | Degree of certainty. | 2. | The Solicitor General states that the government has reason to believe there was subsequent perjury. | 2. | Yamada pleads guilty to six counts of the indictment alleging subsequent fraud on the District Court. |
| 3. | Motive for government witness to lie. | 3. | The opinion in Mesarosh does not deal with possible motive except to speculate that Mazzei's behavior was attributable to a "psychiatric condition." | 3. | Yamada's cooperation with the government and testimony at appellant's trial and his fraud on Judge Cooper both have the identical motive-i.e., to obtain a reduced sentence. |
| 4. | Nature of subsequent act of government witness. | 4. | Suspected subsequent perjury in other proceedings. | 4. | Admitted subsequent submission of false documents to district court in a proceeding directly connected to appellant's trial. |
| 5. | Time frame | 5. | The government witness's conduct apparently spans several years commencing at an unspecified time subsequent to Mesarosh's conviction. | 5. | Yamada commences his conspiracy to commit fraud on the District Court on or about June 26, 1973, (See ¶2 Yamada Indictment 74 Crime 100). -- within two weeks of his testimony at trial. |

Thus, it appears that the instant case is stronger in all respects than Mesarosh, and warrants the granting of a new trial. Issue must respectfully be taken with Judge Medina's statement that "appellants would have us develop some new law because of what they call the special circumstances of this case." Appellant does not seek to establish any new law but merely requests that the rule of Mesarosh, and Chisum, supra, be adhered to. As to the panel's apparent concern with the possibility of a multitude of motions for new trials, it may be noted that the likelihood of similar fact patterns occurring in futuro is remote. In the 18 years elapsed since the Supreme Court decision in Mesarosh in 1956 it would appear from a study of the cases cited in Shepheard's Citations that the Mesarosh holding has been invoked by defendants in less than six federal cases. In reality, the only open question is whether the principles set forth in Mesarosh are to be accorded continuing validity, or whether this Court, in recognition of the voluminous case load of the district court, wishes to treat Mesarosh as a dead letter.

## POINT III

### THE DECISION OF THE PANEL MISSTATES THE RELEVANT STANDARD FOR THE GRANTING OF A NEW TRIAL UNDER RULE 33

In cases involving the possibility of perjury at trial by a key government witness, the relevant Rule 33

standard for determining the materiality of such newly discovered evidence is whether it "might" result in a different verdict in the event of a retrial. United States v. Miller, 411 F.2d 825, 830 (2d Cir. 1969); United States v. Hiss, 107 F. Supp. 128 (S.D.N.Y. 1952), aff'd, 201 F.2d 372 (2d Cir. 1953), cert. den., 345 U.S. 942 (1953); Larrison v. United States, 24 F.2d 82 (7th Cir. 1928). See also United States v. Johnson, 327 U.S. 106, 111 n.5 (1946). Judge Medina invokes a far harsher standard, and thus ignores this court's own decisions regarding the requirements for the grant of a new trial under Rule 33.

The panel herein agreed with the trial judge's finding that there was

> "...no probability that on a new trial with the benefit of the evidence concerning the fraudulent letters a new jury would reach a different conclusion..."

The panel further stated:

> "We are not persuaded that a new jury would decide the case differently if it knew that Yamada's claim at the first trial that he had reformed and turned over a new leaf was false."

The panel thus relied on a test which is tantamount to saying that the Court must be certain that

a jury would reach a different result. As cited above, the correct standard is whether that jury might reach a different verdict.

## CONCLUSION

Under both the holding of Mesarosh and the standards applied by this Circuit in Rule 33 motions, appellant's motion for a new trial should have been granted and this petition for a rehearing en banc should be granted.

Respectfully submitted,

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November 18, 1974

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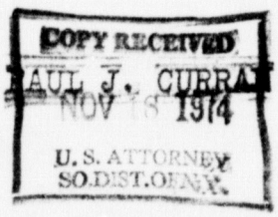
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